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Right to Be Present: People v. Cohen

retroactive application of *Sloan* would adversely effect the administration of justice because pre-screening jurors for effects of pretrial publicity occurred only in the most infamous and time consuming cases.[2089] Thus, the court held that the *Sloan* rule should be applied only prospectively.[2090] Since jury selection occurred before *Sloan* was decided, the court found no violation of defendant's right to be present.[2091]

Federal courts apply new constitutional rules retroactively to all cases pending on direct review or not yet final.[2092] Where a federal constitutional issue is involved, New York courts must apply the federal rule on retroactivity.[2093] If, however, no federal constitutional issue is involved, New York courts will apply the *Pepper* test to determine retroactive or prospective application of a new rule.[2094]

People v. Cohen[2095]
(decided February 7, 1994)

Defendant claimed that his right to be present[2096] at all material stages of a trial was violated when prospective jurors

2089. *Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932 (citing *Mitchell*, 80 N.Y.2d at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995).

2090. *Hannigan*, 193 A.D.2d at 13-14, 601 N.Y.S.2d at 932.

2091. *Id.* The court also rejected additional arguments made by the defendant as being either inappropriate for appellate review or without merit. *Id.* at 14, 601 N.Y.S.2d at 932. In a concurring opinion, Justice O'Brien agreed. *Id.* at 15, 601 N.Y.S.2d at 933 (O'Brien, J., concurring). Justice O'Brien stated that the defendant failed to preserve the record and that there was no need for expanding the record because the defendant did not seek such relief. *Id.* at 14-15, 601 N.Y.S.2d at 933 (O'Brien, J., concurring). Moreover, the defendant did not suffer any serious deprivation of constitutional rights. *Id.* (O'Brien, J., concurring).

2092. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

2093. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

2094. *See, e.g.*, *Hannigan*, 193 A.D.2d at 13, 601 N.Y.S.2d at 932 (applying *Pepper* to determine whether the *Sloan* rule should be applied retroactively or prospectively); *Mitchell*, 80 N.Y.2d. at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995 (applying *Pepper* to determine whether the *Antommarchi* rule should be applied retroactively or prospectively).

2095. ___ A.D.2d ___, 607 N.Y.S.2d 374 (2d Dep't 1994).

were questioned about pretrial publicity outside of his presence.[2097] The appellate division, in affirming the lower court decision,[2098] held that the rule that a defendant must be present during pre-voir dire screening is applied prospectively.[2099]

The *Cohen* case was notorious and received great media attention, as the defendant, a pediatrician, was "convicted of sexually abusing and sodomizing several boys."[2100] At the defendant's trial, potential jurors were pre-screened in order to exclude those "who could not be fair and impartial" due to pretrial publicity.[2101] Since *People v. Sloan*[2102] prohibited such

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2096. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and . . . to be confronted with the witnesses against him . . . ." *Id.*; U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."*Id.*; N.Y. CONST. art. I, § 6. This section states in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . . No person shall be deprived of life, liberty or property without due process of law." *Id.*

2097. ___ A.D.2d at ___, 607 N.Y.S.2d at 375-76.

2098. 158 Misc. 2d 262, 598 N.Y.S.2d 439 (County Ct. Suffolk County, 1993), *aff'd*, People v. Cohen, ___ A.D.2d ___, 607 N.Y.S.2d 374 (2d Dep't 1994).

2099. ___ A.D.2d at ___, 607 N.Y.S.2d at 376. Additionally, the defendant claimed that his right to be present was violated when counsel exercised jury challenges outside of his presence. *Id.* The court found that the record revealed that the exercise of jury challenges was given effect in the defendant's presence. *Id.*

2100. *Cohen*, ___ A.D.2d at ___, 607 N.Y.S.2d at 375; *see also Cohen*, 158 Misc. 2d at 263, 598 N.Y.S.2d at 440.

2101 *Cohen*, 158 Misc. 2d at 263, 598 N.Y.S.2d at 440. In addition, the defendant was not present when the prosecutor and defense attorney advised the court of their respective challenges for cause and peremptory challenges. *Id.* However, the defendant and his attorney did have an opportunity to consult with one another prior to the conference on the challenges. *Id.* Moreover, the defendant was present when the court formally excused those jurors removed for cause and peremptorily. *Id.* Therefore the court held that defendant's absence during these procedures "does 'not constitute a material part of the trial.'" *Id.* at 266, 598 N.Y.S.2d at 442 (citing People v. Velasco, 77 N.Y.2d 469, 473, 570 N.E.2d 1070, 1072, 568 N.Y.S.2d 721, 723 (1991)). Furthermore, the court of appeals has approved of procedures which are

pre-voir dire screening in the defendant's absence, the defendant claimed that his right to be present was violated.[2103] Accordingly, the defendant maintained that the decision in *Sloan* was premised on the Due Process Clause of the United States Constitution,[2104] Further, the defendant alleged that the *Sloan* rule must be applied retroactively to all cases pending on appeal.[2105]

The lower court found that the *Sloan* rule was based on state rather than federal law.[2106] Accordingly, the court applied the

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substantially similar to the one which was used in this case. *Id.* at 265, 598 N.Y.S.2d at 441 (citing *Velasco*, 77 N.Y.2d at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723 *and* People v. Dokes, 173 A.D.2d 724, 570 N.Y.S.2d 357 (1991), *reversed on other grounds*, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992)). Thus, the procedure used by the trial court did not violate the defendant's right to be present. *Cohen*, 158 Misc. 2d at 266, 598 N.Y.S.2d at 442.

2102. 79 N.Y.2d 386, 393, 592 N.E.2d 784, 787, 583 N.Y.S.2d 176, 179 (1992).

2103. *Cohen*, ___ A.D.2d at ___, 607 N.Y.S.2d at 375; *see also Cohen*, 158 Misc. 2d at 263, 598 N.Y.S.2d at 440.

2104. *Id.* at 264, 598 N.Y.S.2d at 440-41; U.S. CONST. amend. XIV.

2105. *Id.* Where the federal constitution is implicated state courts must apply the federal rule on retroactivity, which requires a new constitutional rule to be applied retroactively to all cases pending on appeal. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

2106. *Cohen*, 158 Misc. 2d at 268, 598 N.Y.S.2d at 443. The defendant argued that language used by the Court of Appeals of New York indicates that the *Sloan* rule is retroactive, because the jargon used is reflective of the federal due process test. *Id* at 267, 598 N.Y.S.2d at 442. The defendant claimed that this interpretation finds support in People v. Antommarchi, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992) and People v. Mitchell, 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992). *Cohen*, 158 Misc. 2d at 267, 598 N.Y.S.2d at 442. The court rejected this argument, reasoning that the defendant's interpretation would adversely effect the criminal justice system. *Id.* at 267-68, 598 N.Y.S.2d at 442-43. Such an interpretation takes the language used by the court of appeals out of context. *Id.* The *Sloan* court did not state that it's decision was based on the federal constitution. *Id.* at 268, 598 N.Y.S.2d at 443. Furthermore, it is common to use federal law as a guide for interpreting state law. *Id.* 268-69, 598 N.Y.S.2d at 443-44. Thus, the court did not find feasibility in the defendant's argument. *Id.* at 269, 598 N.Y.S.2d at 444.

state rule on retroactivity set forth in *People v. Pepper*.[2107] In *Pepper*, the court held that three factors are to be weighed in order to determine whether a new rule should be applied retroactively or prospectively: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application."[2108]

The lower court found that application of these factors dictated that the *Sloan* rule should be applied prospectively.[2109] First, the purpose of the rule is to allow a criminal defendant to actively participate in juror examination and selection.[2110] It is not to rectify "any constitutional infirmity inherent" in pre-*Sloan* practices.[2111] Moreover, the *Sloan* rule does not relate directly to the fact-finding process.[2112] Second, there has been substantial reliance by the courts on the previous practice, which was embraced and approved by the lower courts before *Sloan* was decided.[2113] Third, the effect on the administration of justice of retroactive application would be "devastating."[2114] Review of appeals based on *Sloan* would substantially burden the criminal justice system due to the fact that pre-screening jurors for effects of pretrial publicity occurred only in notorious and time consuming cases.[2115] Thus, the lower court held that *Sloan* should be applied prospectively,[2116] and consequently, that

2107. *Id. See also* People v. Pepper, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892, *cert. denied*, 454 U.S. 967 (1981); People v. Mitchell, 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992) (discussing the *Antommarchi* rule).

2108. *Cohen*, 158 Misc. 2d at 269, 598 N.Y.S.2d at 444; *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892.

2109. *Cohen*, 158 Misc. 2d at 270, 598 N.Y.S.2d at 444.

2110. *Id.*

2111. *Id.*

2112. *Id.*

2113. *Id.*

2114. *Id.*

2115. *Id.*

2116. *Id.*

defendant's federal[2117] and state[2118] constitutional right to be present[2119] had not been violated.[2120]

The appellate court summarily stated that based on their recent decision in *People v. Hannigan*,[2121] which determined "that the rule enunciated in Sloan should be applied prospectively, . . .[therefore,] reversal is not required on that ground."[2122]

Federal courts apply new rules retroactively to all cases pending on appeal.[2123] In *Griffith*, the United States Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[2124] New York courts, in contrast,[2125]

2117. U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

2118. N.Y. CONST. art. I, § 6.

2119. *Id.* at 271, 598 N.Y.S.2d at 445. As additional support for it's decision, the court indicated that prospective application of *Sloan* represents a proper balance between the competing interests of the defendant and the state. *Id.* at 270-71, 598 N.Y.S.2d at 445.

2120. *Cohen*, 158 Misc. 2d at 264, 598 N.Y.S.2d at 441. The court also failed to find a violation of the defendant's statutory right to be present. *Id.* at 266, 598 N.Y.S.2d at 442. In a footnote, the court noted that a "defendant's presence by the confrontation and Due Process Clauses of the Federal and State Constitutions, but also by CPL § 260 . . . ." *Cohen*, 158 Misc. 2d at 266, 598 N.Y.S.2d at 442 n.1. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1981) ("A defendant must be personally present during the trial of an indictment . . . ."). The court noted that although the right to be present arises from these distinct sources of law, many decisions relating to the right to be present do not indicate which source of law the decision is based on. *Id. See, e.g.*, People v. Mitchell, 80 N.Y.2d 519, 526, 606 N.E.2d 1381, 1384, 591 N.Y.S.2d 990, 993 (1992) (finding that *Antommarchi*, is based on state rather than federal law).

2121. 193 A.D.2d 8, 601 N.Y.S.2d 928 (2d Dep't 1993).

2122. *Cohen*, ___ A.D.2d at ___, 607 N.Y.S.2d at 376.

2123. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

2124. *Id.* at 328.

2125. The rule on retroactivity in New York is different from the federal system provided that no federal constitutional issue is implicated. People v. Mitchell, 80 N.Y.2d 519, 528, 606 N.E.2d 1381, 1385, 591 N.Y.S.2d 990, 994 (1992).

apply *Pepper* to determine whether a new rule will receive retroactive or prospective application.[2126]

2126. *Cohen*, 158 Misc. 2d at 269, 598 N.Y.S.2d at 444.; *see also Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

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